

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

JOANNE B. AMES,

Appellant,

vs.

Case No. 2005-4254-AV

VERGIL SMITH

Appellee.

CONSOLIDATED WITH

JOANNE B. AMES,

Plaintiff-Appellee,

vs.

Case No. 2005-2411-AV

HUNTINGTON BANKS OF MICHIGAN
and VERGIL SMITH,

Defendants-Appellant.

OPINION AND ORDER

In this consolidated action, defendant Huntington Banks of Michigan ("the Bank") appeals a judgment of the 37th District Court dated March 28, 2005.¹ Plaintiff Ames further appeals orders of the district court dated July 26, 2005, and September 30, 2005.

Plaintiff Ames filed her initial complaint in the 37th District Court on November 23, 2004. A bench trial was held on March 15, 2005, before the Hon. Walter A. Jakubowski, Jr., in the 37th District Court. Plaintiff brought claims against defendants the Bank and Smith for alteration of check and its unauthorized payment (count I) and implied contract (count II). The



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basic facts giving rise to the action were undisputed. On March 18, 2004, Joanne B. Ames made a \$20,000 loan to an entity called "On Time." The sole shareholder of On Time was Gino Accetola, who, on behalf of "On Time," issued a promissory note for the loan. Ms. Ames delivered a check for \$20,000 with "On Time" as payee. It is also undisputed by the parties that before the check was cashed at Huntington Bank, the payee had been changed by Gino Accetola to "On Time or Vergil Smith."² It is undisputed that Vergil Smith knew that the payee had been changed. It is undisputed that Smith then cashed the check at Huntington Bank, and gave the proceeds to Accetola, in the form of two checks and cash.³ In a judgment dated March 28, 2005, the trial court ruled for plaintiff in the amount of \$20,000 plus costs against both Huntington Bank and Smith. The Bank filed their claim of appeal on June 16, 2005. Subsequently, Smith moved for a new trial and/or relief from judgment. In an *Opinion and Order* dated July 26, 2005, the trial court granted defendant Smith's motion for relief from judgment, finding that there was not a proper basis for finding Smith liable where he did not commit any fraud. The Bank now appeals several decisions made by the district court, and plaintiff Ames appeals the Court's decision to dismiss Smith.

The Court will first consider the Bank's appeal. Huntington Bank first argues that the trial court erred in failing to grant summary disposition in its favor. In this regard, the Bank argues that the evidence presented in support of its motion established the Intended Payee Defense. In this regard, the Bank notes that the initial payee, "On Time," authorized the alteration, Ames' obligation did not change as a result of the alteration, and "On Time" received the proceeds. The Bank notes that what happened here would have been the same as if On Time

¹ At the hearing on the appeal on March 20, 2006, the Court set aside the trial court's dismissal of the Bank's appeal.

² The spelling of "Vergil" has been inconsistent throughout the pleadings, but it appears Mr. Smith spells his name with an "e."

signed the check over to Smith, who then in turn cashed the check and gave the proceeds to On Time. Second, the Bank contends the trial court erred in failing to find that the Bank established the intended payee defense. Third, the Bank contends the trial court erred in failing to dismiss plaintiff's case at the close of her proofs. Here, the Bank contends that numerous evidentiary rules were violated, and that plaintiff was permitted to introduce evidence and testimony without a proper foundation. Fourth, the Bank contends the trial court erred in failing to set forth findings of fact and conclusions of law. Fifth, the Bank argues the trial court erred in failing to dismiss the action because plaintiff failed to mitigate her damages. In this regard, the Bank notes plaintiff failed to sue "On Time" for failure to pay back the loan. Finally, the Bank contends the trial court erred in failing to grant its motion for a mistrial. The Bank maintains that the trial court made remarks on the bench evincing its prejudice against the Bank and favoring plaintiff. The Bank requests the Court vacate the trial court's order denying appeal dated June 8, 2005.

Plaintiff responds that the Bank is liable for paying on an altered check because the alteration did in fact change her obligation. That is, her obligation then became to pay Vergil Smith, but she had never intended to pay Vergil Smith or to owe Vergil Smith money. Plaintiff contends that Vergil Smith had the benefit of the money. Plaintiff notes Smith gave the money to Gino Accetola, in turn, not "On Time."

An appellate court reviews a trial court's findings of fact in a bench trial for clear error and its conclusions of law de novo. MCR 2.613(C). *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). "A finding is clearly erroneous where, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made." *Krol*, 512.

³ Plaintiff Ames pursued criminal charges against Accetola and he was convicted of same. Restitution of \$20,000, in addition to serving a prison sentence, was ordered.

Plaintiff's complaint was based upon MCL 440.4401(3) because of defendant Bank's unauthorized payment of Plaintiff's check. (Pl response brief to def Bank's motion for summary disposition, p 7.) Under MCL 440.4401(3), a bank may charge against the account of its customer a check or item that is "properly payable." "Implicit in this rule is the notion that a bank may not charge against the account of its customer a check or item that is *not* 'properly payable.'" *Pamar Enterprises, Inc v Huntington Banks of Mich*, 228 Mich App 727, 735; 580 NW2d 11 (1998). Accordingly, the drawer of a check has a remedy against the drawee bank for recredit of the drawer's account for the unauthorized payment of the check in the amount of the improper payment. *Pamar*, 735.

Defendant Bank cited as a defense to the entire case the "intended-payee defense." The intended-payee defense provides that a drawee bank is not liable to the drawer of a check for an improper payment if (1) the proceeds of the check reach the person the drawer intended to receive them and (2) the drawer suffers no loss proximately caused by the drawee's improper payment. *Pamar*, 737. This defense is intended to prevent the unjust enrichment of the drawer. *Pamar*, 737. The Court in *Pamar* applied the intended-payee defense to the unauthorized payment context, noting that the Court of Appeals had previously adopted such defense in an action for breach of presentment warranties, *Comerica Bank v Michigan Nat'l Bank*, 211 Mich App 534, 538; 536 NW2d 298 (1995). *Pamar*, 737-738.

The *Comerica Bank* Court explained that the defense is grounded on two basic principles. First, it is aimed at preventing a drawer from being unjustly enriched by recovering for an improperly paid check where the proceeds of the check in fact were received by the payee. *Comerica Bank*, 538. Additionally, it is also justified where a bank's improper payment is not a cause of the drawer's injury flowing from the transaction. *Comerica Bank*, 538. As *Comerica*

Bank explained, the usual scenario in which a drawee bank is liable for improper payment for paying a forged or improper check begins when the payee informs the drawer that it never received the check. In *Comerica Bank's* case, as here, this is not what happened. Instead, in *Comerica Bank*, the drawer was ultimately defrauded by the representatives of the payee; the payee, a corporation, never informed the drawer that it did not receive the check. Instead, *Comerica Bank* noted, "plaintiff is utilizing the presentment warranty to recoup its loss for making a bad loan." *Comerica Bank*, 540. Therefore, the Court found the bank was not liable for breaching its presentment warranty, because it had sufficiently established the intended-payee defense; the trial court erred as a matter of law in granting plaintiff's motion for summary disposition.

The Court is persuaded *Comerica Park* is on point and controlling in this case. Even assuming arguendo that the Bank wrongfully paid on the check, the Bank established a defense for the breach in establishing the elements of the intended-payee defense. Plaintiff testified that she issued the check for \$20,000 intending it to be payable to On Time. (Tr 18) Plaintiff testified that Gino Accetola gave her a promissory note for On Time Corporation, signing for the corporation. (Tr 20) Gino Accetola testified at trial that he was the only corporate officer of the company "On Time." (Tr 36) The check was made out to "On Time." Accetola testified that he added Vergil Smith's name to the check. (Tr 37) Accetola ultimately received \$20,000, approximately \$13,500 in two checks and the rest in cash. (Tr 37) These facts are undisputed by the parties. As sole officer of "On Time," Accetola was the only person who could endorse a check written to the corporation. Thus, when plaintiff issued the check to "On Time," it was going to be endorsed by Accetola. Accetola's actions in ultimately stealing the funds from his

own corporation (de facto or otherwise) are secondary. There is no genuine issue that the proceeds of the check reached the person the drawer intended to receive them.

Moreover, the evidence showed that the drawer suffered no loss proximately caused by the drawee's improper payment. Plaintiff's loss was caused by Accetola's fraud and/or embezzlement. Again, assuming arguendo that the Bank improperly paid on the check, the Bank is not the cause of the loss. The payee, On Time, has not demanded payment from plaintiff, for example, as a separate entity, to receive \$20,000. The loss was caused by Accetola's absconding with the money and not paying it back. Finally, the Court is persuaded that the intended-payee defense applies here. As stated, it has been applied previously by the *Pamar* Court regarding an unauthorized payment claim, and in *Comerica Park* in the payment warranty context. The Court is persuaded it applies here as well, where plaintiff's complaint is based on unauthorized payment and breach of implied contract. Therefore, the Court is persuaded that the March 28, 2005 judgment of the district court should be reversed and the Bank dismissed.

The Court will now consider plaintiff's appeal of the September 30, 2005, *Opinion and Order* denying plaintiff's motion for reconsideration of the final judgment dated July 26, 2005. Plaintiff filed this claim of appeal, in Case No. 2005-4254-AV, on October 21, 2005.

Plaintiff argues on appeal that the trial court abused its discretion in setting aside its previous judgment and in dismissing the case against defendant Vergil Smith pursuant to MCR 2.116(C)(f). First, plaintiff asserts that at trial Smith admitted that he knew the check had been altered, that he endorsed the check as payee, and that he received the proceeds. Plaintiff contends the trial court's "findings" in its *Opinion and Order* granting Smith's motion for relief from judgment was not supported by any evidence presented at trial. Plaintiff contends the trial court's finding that Accetola in fact benefited is not supported by the record, nor that the

intended payee "On Time" received the proceeds. Finally, plaintiff asserts that granting relief under MCR 2.116(C)(f) was improper, as it is the "catchall" provision and requires that (1) the reason for setting aside the judgment does not fall under subsections (a) through (e); (2) the substantial rights of the opposing party will not be detrimentally affected if the judgment is set aside; and (3) extraordinary circumstances exist that mandate setting aside the judgment. Plaintiff further avers an additional condition is that this subject is only applicable when the judgment was obtained by the improper conduct of the party in whose favor it was rendered, which cannot be established here.

Defendant responds that the trial court did not abuse its discretion, as its *Opinion and Order* was supported by the record. Defendant contends that the gravamen of the trial court's ruling was that he did not engage in any fraudulent or wrongful conduct. Defendant avers the trial court correctly observed that plaintiff produced no evidence that defendant either participated in the fraud or was aware of the same. Defendant contends the trial court noted that unless Smith engaged in fraud or illegality he could accept transfer of a check from the payee. MCL 440.3203(2). Additionally, defendant argues, the trial court aptly found that plaintiff was in essence suing him for conversion, but under the UCC such a claim cannot be brought by the issuer of the instrument. MCL 440.3420(1).

A motion for relief from judgment under MCR 2.612 may only be reviewed for an abuse of discretion. *McNeil v Caro Community Hosp*, 167 Mich App 492, 497; 423 NW2d 241 (1988). "In civil cases, an abuse of discretion exists when the decision is so violative of fact and logic that it evidences a defiance of judgment and is not the exercise of reason, but rather, of passion or bias." *Hadfield v Oakland Co Drain Comm'r*, 218 Mich App 351, 355; 554 NW2d 43 (1996).

In this case, as stated, defendant Smith filed a motion for relief from a judgment dated March 28, 2005. It is unclear from the record when the motion for relief from judgment was filed, but the motion was heard on June 13, 2005. In the *Opinion and Order*, the trial court indicated that upon review of the trial transcript, "the Court is persuaded that it did not have sufficient basis in the record to enter judgment against Defendant, Vergil Smith." In other words, the trial court ruled it had made a mistake. The trial court ruled that the payee, On Time, was free to transfer the check to any party without the approval of the check's issuer, Ames. The Court noted that the evidence showed that the payee, On Time, did benefit from the transaction, as its sole shareholder/officer, Accetola, received all of the proceeds from the check. While evidence suggested the payee induced plaintiff into writing the check, the trial court ruled, there was no evidence that Smith, as transferee, who did not receive any of the proceeds, engaged in any kind of fraud or illegality affecting the instrument.

First, the Court is persuaded that while the trial court granted relief under MCR 2.612(C)(1)(f), finding that there are reasons "justifying relief from the operation of the judgment," the trial court should have granted relief pursuant to MCR 2.116(C)(1)(a). A party may be relieved from a final judgment, order, or proceeding on the basis of mistake. MCR 2.612(C)(1)(a). The mistake may be a mistake of the trial court. *Altman v Nelson*, 197 Mich App 467, 477; 495 NW2d 826 (1992). When a party seeks relief on the basis of mistake, even the court's mistake, the rule requires that the motion be made within one year after the judgment, order, or proceeding was entered or taken. MCR 2.612(C)(2). In this case, defendant's motion was made at least by June 13, 2005, well within the year of the judgment. The Court is persuaded that MCR 2.612(C)(1)(a) applies to this case. Also, it is axiomatic that a reviewing

court will not reverse a trial court's decision if the correct result is reached for the wrong reason.

Computer Network, Inc v AM General Corp, 265 Mich App 309, 313; 696 NW2d 49 (2005).

Second, the Court is not persuaded that the trial court abused its discretion in granting the relief from judgment. As stated above, the intended payee was On Time. Accetola was the sole shareholder and officer of On Time, the only person who could physically endorse an On Time check. There is no dispute that the check was received by Accetola, who added the words "or Vergil Smith." There is no dispute that On Time's sole officer, Accetola, received the proceeds. While plaintiff contends the evidence showed Smith committed forgery, the crime of forgery includes as an element the "intent to injure or defraud any person." MCL 750.248. The Court is persuaded that the trial court did not err in finding there was no such intent on the part of Smith, who merely intended Accetola to cash a check written out to his business because Accetola did not yet have an account created. Hence, it could not be found that Smith, as transferee, did not acquire the rights of a holder in due course due to "fraud or illegality," as cited by plaintiff. MCL 440.3203(2). The Court notes that had Accetola endorsed the check properly first, i.e., by signing on behalf of On Time on the back, and then making it payable to Vergil Smith, plaintiff would have no argument against Smith. This Court is not persuaded the trial court abused its discretion in ruling that such transfer was effectuated by Accetola's adding Smith's name. While improper and clumsy, this method does not provide a basis for liability on the part of Smith. Again, simply put, the party responsible for defrauding plaintiff in this case is Accetola. The Court therefore is not persuaded to grant plaintiff's appeal.

For the foregoing reasons, Huntington Bank's appeal of the 37th District Court's March 28, 2005, judgment is GRANTED. The March 28, 2005 judgment is REVERSED, and Huntington Bank is DISMISSED. Plaintiff's appeal of the September 30, 2005, *Opinion and*

Order denying her motion for reconsideration of the *Opinion and Order* dated July 26, 2005, is DENIED. The order dated July 26, 2005, is AFFIRMED. In compliance with MCR 2.602(A)(3), the Court states this *Opinion and Order* resolves the last pending claim and CLOSES both cases.

IT IS SO ORDERED.



JAMES M. BIERNAT, Circuit Judge

JMB/kmv

DATED: MAY 22 2006

cc: Donald P. Howard, Attorney at Law

Lawrence G. Reinhold, Attorney at Law

Matt Savich, Attorney at Law

37th District Court

Attention: Honorable Walter A. Jakubowski, Jr.